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No. 98-1326

In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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8pp

TABLE OF CONTENTS

Page

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Brzonkala v. *Virginia Polytechnic Institute*,
Slip op. (4th Cir. March 5, 1999) . . . . . *passim*

United States v. *Lopez*, 514 U.S. 549 (1995) 1-4

United States v. *Page*, 1999 U.S. App. LEXIS 2696
(6th Cir. Feb. 23, 1999) 4-5

STATUTES

18 U.S.C. § 2261 4,5

42 U.S.C. § 13981 1,2,5

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner wishes to call this Court's attention to a significant development that has occurred since the filing of Petitioner's Supplemental Brief on March 3, 1999. On March 5, the United States Court of Appeals for the Fourth Circuit issued its long-awaited, en banc decision in *Brzonkala* v. *Virginia Polytechnic Institute*, holding by a 7-4 vote that the Violence Against Women Act ("VAWA") exceeds Congress's authority under the Commerce Clause. The Fourth Circuit's reasoning conflicts in several respects with the Second Circuit's analysis in this case and the court's invalidation of VAWA should remove any doubt about whether this case merits review.[1]

1. *The Fourth Circuit's En Banc Decision.* Judge Luttig's 124-page opinion for the majority was joined by Chief Judge Wilkinson and by Judges Widener, Wilkins, Niemeyer, Hamilton and Williams. See slip op. 5-129.[2] Chief Judge Wilkinson (*id.* at 132-46) and Judge Niemeyer (*id.* at 147-60) also wrote separate concurrences. Judge Motz, joined by Judges Murnahan, Ervin and Michael, dissented. *Id.* at 162-214.

Based on an exhaustive analysis of the Commerce Clause issue (slip op. 13-74), Judge Luttig's opinion for the court concludes that VAWA "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded." Slip op. 6. This Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Judge Luttig explained, "all but preordained as much"; he criticized the government's arguments as "little more than wistful assertions that * * * *Lopez* is an aberration of no significance." Slip op. 6. VAWA's damages remedy for gender-motivated violence (42 U.S.C. § 13981) exceeds Congress's power under the Commerce Clause, the majority reasoned, because (1) the violent conduct targeted by the statute is in no sense economic or commercial (slip op. 20-24); (2) the damages remedy lacks an

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[1] In an effort to avoid burdening this Court with another Supplemental Brief, counsel requested the government to withdraw its waiver of a response, but the government declined to do so.

[2] For the Court's convenience, we have lodged eleven copies of the Fourth Circuit's slip opinion with the Clerk.

express jurisdictional element (*id.* at 24-25); and (3) to uphold the statute would require resort to "arguments that lack any principled limitations and would, if accepted, convert the power to regulate interstate commerce into a general police power" (*id.* at 28). *Lopez*, the majority explained, "clearly forecloses" reliance on arguments based on attenuated effects on the national economy, at least where the regulated conduct consists of "*noneconomic* activities." Slip op. 31 (emphasis in original).

The majority also emphasized that VAWA impinges on state authority over violent crime and domestic relations. Slip op. 32-34, 36-37.[3] And it rejected the argument that Section 13981 of VAWA should be upheld under the Commerce Clause because (1) Congress made "findings" establishing a connection between gender-motivated violence and interstate commerce which are entitled to deference; and (2) this particular provision concerns "civil rights," an area "of manifest federal concern." Slip op. 40; see also *id.* at 41-74. The majority also rejected the argument that Section 13981 could be upheld under Section 5 of the Fourteenth Amendment. *Id.* at 75-128.

2. *The Fourth Circuit's Analysis Conflicts With The Decision Below.* The Second Circuit in this case summarily rejected petitioner's Commerce Clause challenge by expressly "adopt[ing]" the district court's analysis. Pet. App. 2a. The district court, in turn, reasoned that (1) "[t]he challenged statutory provision [of VAWA] arose in an area in which Congressional power is *exceedingly broad*" (*id.* at 9a (emphasis added)); (2) a reviewing court must apply "rational basis" review to Congress's determination that a statute falls within its Commerce Clause authority (*id.*

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[3] Slip op. 33-34 ("[I]t is clear that the balance between federal and state responsibility is implicated not only by federal criminal statutes, but also by any federal sanction for such crime, even in the form of a civil remedy."); *id.* at 36 (stating that "primary locus" of Section 13981 "is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States"); *id.* at 37 (referring to "this most traditional area of state concern"); see also *id.* at 143 (Wilkinson, C.J., concurring) (stating that VAWA "scales the last redoubt of state government — the regulation of domestic relations").

at 9a-10a); (3) the fact that Congress "alluded" to "the substantial toll of domestic violence on the physical and economic welfare of individuals directly affected by such violence as well as the public generally" sufficed to establish the requisite rational basis for the statute (*ibid.*); and (4) this Court's *Lopez* decision "concerned only * * * the third category of activity" that Congress can regulate under the Commerce Clause — wholly intrastate activity that has a substantial effect on interstate commerce (*id.* at 10a).

The Fourth Circuit's reasoning is in conflict (or at least considerable tension) on each of these points. Far from recognizing an "exceedingly broad" congressional authority over the problem of violence against women, the Fourth Circuit reasoned that Congress's Commerce Clause authority in this area is limited because the activity targeted by VAWA is noncommercial in nature and trenches on traditional state authority in several respects. See page 2, *supra*. Second, the Fourth Circuit rejected the notion that *Lopez* requires a highly deferential rational-basis review and instead conducted an independent evaluation of Congress's "findings" relating to gender-motivated violence. Slip op. 41-51, 53. Third, the mere allusion to an impact on the national economy of domestic violence is woefully insufficient, under the Fourth Circuit's analysis, to establish that VAWA is constitutional. And fourth, the Fourth Circuit refused to read *Lopez* in a cramped or restrictive fashion.

The Fourth Circuit's analysis is also sharply at odds with the decision below in the significance it attaches to *Lopez*'s discussion of whether the conduct targeted by a congressional enactment is commercial in nature. The district court in this case begrudgingly stated that the "noncommercial" nature of the activity targeted by VAWA "*might* carry *some* weight" in a Category III case, but concluded that it was essentially irrelevant in a Category I case where interstate activity is involved. Pet. App. 12a-13a (emphasis added). In marked contrast, the Fourth Circuit read *Lopez* as placing "*enormous* emphasis * * * on the 'commercial concerns that are central to the Commerce Clause[]' * * * and on the corresponding distinction between regulations of commercial or economic activities and regulations of noncommercial, noneconomic activities." Slip op. 17 (emphasis added) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)); *id.* at 17-19

n.5 (stating that it is "impossible to ignore" this distinction and faulting the dissent and the government for doing so).

3. *The Fourth Circuit's Decision Confirms That This Case Provides The Best Vehicle To Clarify* Lopez *And Congress's Authority Over Domestic Relations*. As we explained in the petition for certiorari (at 15-19), there has been considerable confusion in the lower courts over the meaning of *Lopez*. This confusion includes uncertainty over the precise contours of Categories I, II and III of Congress's Commerce Clause authority. Pet. 17-18. By urging broad interpretations of the "channels" (Category I) and "instrumentalities" (Category II) of interstate commerce, the government ironically has succeeded, since *Lopez*, in *expanding* Congress's Commerce Clause power. Pet. 17-18.

This troubling phenomenon cannot be rectified, we submit, if this Court grants review only of a case (such as *Brzonkala*) involving Section 13891. The reason is simple. As the Fourth Circuit's opinion makes clear (slip op. 15 n.4), Section 13891 can be upheld only as a Category III statute. Indeed, the government did not even argue in *Brzonkala* that Category I or II applied. In contrast, the government in *this* case contended in the lower courts that Section 2261(a)(1) of VAWA can be upheld under *all three categories*. See Pet. 17; C.A. Br. 44-56. If review is granted in this case, the government will no doubt reiterate these arguments. Accordingly, this case offers a valuable opportunity to clarify the boundaries of Categories I, II and III that *Brzonkala* plainly does not offer.

Moreover, granting review in *Brzonkala* alone would threaten to exacerbate some of the problems identified in the petition for certiorari. If the Fourth Circuit's decision were affirmed (as we expect it would be), this would only drive the government to even greater lengths in its efforts to shoehorn statutes into Categories I and II and to argue that *Lopez* has no relevance to those categories. In view of the potential overlap between Category I and III (see Pet. 17-18), this is a recipe for further confusion and arbitrariness.

As predicted in our petition for certiorari (at 20), *Brzonkala* also required the Fourth Circuit to address, at length, an alternative basis for congressional authority: Section 5 of the Fourteenth Amendment. See slip op. 75-128. And *Brzonkala*, like *United*

States v. *Page*, 1999 U.S. App. LEXIS 2696 (6th Cir. Feb. 23, 1999), involves a threshold question of statutory interpretation that, if answered differently, would obviate the need to reach any constitutional question. Slip op. 12-13 & n.3; Supp. Br. 1-2; Pet. 20-21. Because the provision of VAWA at issue in this case cannot be defended as an exercise of Section 5 authority, and because our petition for certiorari raises no threshold question of statutory construction, this case more cleanly and surely presents the Commerce Clause issue than does either *Brzonkala* or *Page*.

The *Brzonkala* decision also confirms the superiority of this case as a vehicle for addressing the important issue of Congress's authority over matters of domestic relations, which have long been regulated by the States. See Pet. 11-15, 20; Supp. Br. 3-4. As Judge Luttig correctly notes, Section 13981 "explicitly precludes the federal courts from exercising supplemental jurisdiction that might otherwise extend to" family-law matters. Slip op. 36 (citing 18 U.S.C. § 13981(c)(4)); accord Pet. 20. Section 2261(a), in contrast, contains no such limitation. In addition, Section 2261(a) covers only violence in marriages and other intimate relationships; Section 13981, in contrast, covers violence "motivated by gender" even when it occurs outside of family or other intimate relationships. This case is accordingly a far better vehicle for addressing Congress's authority in the sensitive area of domestic relations.

4. Brzonkala *Does Not Present Any Issue Concerning The Federalization of State Crimes*. Although the Fourth Circuit did note that Section 13981 provides a federal "remedy for violent crime in addition to that provided by the States" (slip op. 33), and observed that such supplementation "inescapably lead[s] to changes in the allocation of state law enforcement and judicial resources" (*ibid.*), the court had no occasion to address directly the serious problem of the ongoing federalization of traditional state law. See Pet. 21-24; Supp. Br. 4 & n.4. This case, in contrast, squarely raises that important issue.

* * *

The United States intervened as a party in *Brzonkala*. It is simply inconceivable, we submit, that the Solicitor General would not file a petition for certiorari in *Brzonkala* if review is denied in this case. Why then does the government not even bother to file

a response to the petition in this case? While we can understand the government's desire to avoid making contradictory statements in opposing review in this case while simultaneously petitioning for review in *Brzonkala*, that parochial litigation interest hardly justifies withholding the government's views from this Court.

The Court should, at a minimum, call for a response from the Solicitor General. Petitioner is serving a life sentence under a statute that has now been declared unconstitutional. She is entitled to know why the government disagrees with the substantial arguments for review that have been put forward in the petition. The various *amici* who have indicated that they believe this case is so important that they will be filing briefs in support of the petition are likewise entitled to a response from the United States. And, most importantly, so is this Court.

CONCLUSION

The petition for a writ of certiorari should be granted or, at a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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